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THE NUISANCE ACT AND

THE FARM PRACTICES PROTECTION ACT

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CHAPTER 1

INTRODUCTION

A. BACKGROUND

Professor Philip Osborne of the University of Manitoba, Faculty of Law suggested that the Manitoba Law Reform Commission review *The Nuisance Act*.[1] This legislation, unique to Manitoba, restricts the availability of common law nuisance actions in respect of activities creating offensive odours. In the course of examining the history and purpose of *The Nuisance Act*, the Commission has also identified a need for review of *The Farm Practices Protection Act*[2] (the "*FPPA*"), successor to *The Nuisance Act*. The *FPPA* immunizes agricultural operators from liability in nuisance in connection with a wide range of agricultural activities.

For centuries, the common law of nuisance has served to resolve conflicts between neighbours over incompatible land use.[3] *The Nuisance Act* and the *FPPA*, enacted in 1976 and 1992 respectively, restrict the role of the common law of nuisance in resolving such disputes. This legislation has important implications for the environment and the exercise of individual property rights, and in that respect merits careful consideration.

This report begins with a discussion of the common law action in nuisance, the significance of the law of nuisance in the modern legal context and some factors to be considered when derogating from the common law by statute. A review of the historical role and principal features of the common law of nuisance will place *The Nuisance Act* and the *FPPA* in context, and provide a background to the Commission's recommendations for reform.

Chapter 3 of this report examines the legislative history of *The Nuisance Act* and its role in Manitoba's legal system, and concludes with a recommendation for the Act's repeal.

Chapter 4 introduces *The Farm Practices Protection Act* and identifies both the merits of the legislative scheme and the criticisms that have been leveled against this type of legislation. The Commission concludes with a single recommendation for a broad, inter-disciplinary and public review of the Act and its operation.

B. ACKNOWLEDGMENTS

The Commission extends its thanks to Professor Philip Osborne for suggesting the review of *The Nuisance Act*. Many thanks also to the staff of the University of Manitoba, Faculty of Law Library and the Manitoba Legislative Libraries for their able assistance. The Commission also appreciates the cooperation and assistance of the Farm Practices Protection Board.

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[1] RSM 1987, c N120, CCSM c N120, see Appendix A.

[2] SM 1992, c 41, CCSM c F45, see Appendix B.

[3] For a detailed history of the tort of nuisance, see Gregory Pun & Margaret Hall, *The Law of Nuisance in Canada* (Markham: Lexis Nexis, 2010) at 18-32, in a section authored by Christopher Harvey.

The Commission distributed a Consultation Paper in October 2012 to 35 potentially interested parties. It received comments from Keystone Agricultural Producers, Manitoba Pork Council and the Government of Canada, Department of Agriculture and Food Inspection. The Commission is grateful to these respondents for their thoughtful remarks.

CHAPTER 2

THE COMMON LAW OF NUISANCE

A. THE TORTS OF PRIVATE NUISANCE AND PUBLIC NUISANCE

Although the term "nuisance" applies to a variety of legal proceedings, including criminal prosecutions in nuisance and statutory nuisance,[1] this report is focused on the common law tort of nuisance. Nuisance is one of five torts that protect a proprietary or possessory interest in land.[2] It has been invoked to provide a remedy in a vast range of circumstances, from crowing roosters to objectionable public behaviour.[3]

Perhaps due to this fluidity, there is a "general agreement that [nuisance] is incapable of any exact or comprehensive definition".[4]

There is an important distinction between actions in private nuisance and those in public nuisance. Private nuisance typically concerns disputes between individual landowners about conflicting land use, while public nuisance refers to activities affecting the public welfare.

1. Principal Features of the Tort of Private Nuisance

A leading Canadian case endorsed the following proposition, outlining the essential principles of the tort of private nuisance:

> A person, then may be said to have committed the tort of private nuisance when he is held to be responsible for an act directly causing physical injury to land or substantially interfering with the use or enjoyment of land or an interest in land where, in the light of all the surrounding circumstances, this injury or interference is held to be unreasonable.[5]

A variation of this definition has been adopted in a long line of Canadian authority.

Interference can take the form of actual physical damage to the land, as in the case of flooding or structural damage, or intangible interference with the claimant's enjoyment and

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[1] Ann Cullingham, "Chapter 17, Nuisance" in Linda Rainaldi ed., *Remedies in Tort*, looseleaf (consulted on October 15, 2012) (Scarborough: Thomson Reuters Canada, 1987) vol 3 [Cullingham] at 17-14. The author identifies five different legal proceedings to which the term "nuisance" can apply: a tort action for private nuisance; a private tort suit for public nuisance; an action for public nuisance; criminal proceedings for nuisance; and statutory nuisance.

[2] The others are negligence, the rule in *Rylands v. Fletcher*, waste, and trespass.

[3] For a description of the wide range of circumstances addressed in the law of nuisance see J. Fleming, *The Law of Torts*, 9th ed (Sydney, N.S.W.: LBC Information Services 1998) at 457.

[4] *St. Pierre v. Ontario (Minister of Transportation)* (1983), 43 OR (2d) 767 (Ont CA), aff'd. [1987] 1 SCR 906, at 18.

[5] *Royal Anne Hotel Co. v. Ashcroft (Village)* (1979), 95 DLR (3d) 756 at 760 (BC CA), citing Street, *Law of Torts*, at 215.

comfort of the land. The focus is on the harm done to the claimant's interest in his or her land, rather than any particular conduct on the part of the defendant.[6]

In deciding whether a given interference constitutes a legal nuisance, courts have asked if the defendant is using his or her property reasonably having regard to the fact that he or she has a neighbour.[7] In other instances, the courts have questioned whether in the circumstances it is reasonable to deny compensation to the aggrieved party.[8] These various formulations of the test highlight the importance of balancing the parties' interests, and the highly fact-specific nature of the inquiry.

The role of nuisance law in achieving a balance among competing interests is by no means an exclusively modern phenomenon. The elaboration of common law nuisance principles has taken place over the course of many centuries. From as early as the 13th century, people have brought law suits in nuisance against their neighbours in connection with offensive odours, excessive noise, and air and water pollution. The subject matter of many of these early cases will be familiar to the modern reader. A significant 17th century case, for example, concerned odours emanating from a pig sty. The claimant raised arguments about the effect of such odour on the natural environment and health of nearby residents, and, in his defence, the defendant relied on the social benefits of raising pigs.[9]

The Ontario Court of Appeal's recent decision in *Antrim Truck Centre*[10] articulates a two-part test for determining whether a particular interference constitutes an actionable nuisance: first, is the interference substantial and, second, is the interference unreasonable? The first part of the test derives from lengthy authority to the effect that the law will not provide a remedy for trivial annoyances, and that "the very existence of organized society depends on a generous application of "give and take, live and let live".[11]

In determining whether the interference is unreasonable, courts generally refer to four main factors:

(1) The severity of the interference;
(2) The character of the neighbourhood;
(3) The utility of the defendant's conduct; and

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[6] These principles are confirmed in a long line of authority including the Supreme Court of Canada's decision in *St. Lawrence Cement v. Barrette*, 2008 SCC 65 at para 77, [2008] 3 SCR 392. Although the court was deciding on the interpretation of Quebec's *Civil Code*, the judgment includes a description of the principal features of the common law tort of private nuisance.

[7] *Canada (National Capital Commission) v. Pugliese* (1977), 17 OR (2d) 139 (available on CanLII) (Ont CA), aff'd [1979] 2 SCR 104.

[8] *Tock v. St. John's (City) Metropolitan Area Board*, [1989] 2 SCR 1181 (available on CanLII) [*Tock*].

[9] *Aldred's Case* (1610) 77 ER 816 [1558-1794] as cited in Gregory Pun & Margaret Hall, *The Law of Nuisance in Canada* (Markham: Lexis Nexis, 2010) [Pun] at 24.

[10] *Antrim Truck Centre Ltd. v. Ontario (Transportation)* 2011 ONCA 419, 106 OR (3d) 81 [*Antrim*], leave to appeal to S.C.C. granted, 34413 (February 2, 2012).

[11] *Tock*, *supra* note 8, citing Knight Bruce V.C. in *Walter v. Selfe* (1851), 4 De G. & Sm. 315, 64 ER 849, and Bramwell B. in *Bamford v. Turnel* (1862) 122 ER 27.

(4) The sensitivity of the plaintiff.[12]

Historically, the extent to which these factors are applied and their relative weight has depended on whether the nuisance complained of caused physical damage to the claimant's land. In most circumstances, the courts have found that physical damage to land is an unreasonable interference and actionable nuisance, without giving extensive consideration to the factors identified above. These factors are more significant in cases involving interferences with the use and enjoyment of land, in which courts are generally more reluctant to find liability and more inclined to engage in a balancing exercise.[13]

Nuisance is frequently described as a strict liability tort, on the basis that:

> Liability does not depend upon the nature of the defendant's conduct or on any proof of intention of negligence. It depends primarily upon the nature and extent of the interference caused to the plaintiff.[14]

However, most commentators now identify a drift in the law of nuisance away from its strict liability origins. A leading authority states that "while there is an "aura" of strict liability in nuisance actions, in most cases there is no liability without some fault."[15] Fault in this context has been interpreted as a quite neutral concept, signifying the defendant's involvement in the creation of an annoyance.[16]

The notion of fault in private nuisance analysis has led to some blurring of the line between nuisance and negligence.[17] And while the same set of facts may often give rise to both causes of action, there are important differences between the two. Unlike in negligence, the focus in nuisance is on the harm suffered by the plaintiff rather than on the defendant's conduct. In nuisance, the defendant cannot defeat the action solely by establishing that he or she exercised all reasonable care.[18]

Perhaps most significantly, in nuisance the initial onus is on the plaintiff to prove damage resulting from the defendant's activity, or a significant degree of discomfort or inconvenience. The onus then shifts to the defendant to prove that the interference was not unreasonable.[19] By contrast, in a negligence action, the plaintiff must prove that the defendant did not exercise reasonable care.

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[12] *Antrim*, *supra* note 10 at para 83. Malice on the part of the defendant may also be a factor in some cases: see *Christie v. Davey*, [1893] 1 Ch 316.

[13] See discussion in Philip Osborne, *The Law of Torts* 4th ed (Toronto: Irwin Law, 2011) at 378, 380.

[14] *Ibid* at 378.

[15] Fleming, *supra* note 3. See also the statement of the Judicial Committee of the Privy Council in *Overseas Tankship (U.K.) Ltd. v. Miller Steamship Co. Pty* (The Wagon Mound No. 2), [1966] 2 All ER 709 at 716: "although negligence may not be necessary, fault of some kind is almost always necessary".

[16] Pun, *supra* note 9 at 8.

[17] Pun, *supra* note 9 at 2.

[18] Cullingham, *supra* note 1 at 17-13.

[19] See Allen Linden & Bruce Feldthusen, *Canadian Tort Law* (Markham: LexisNexis, 2011) at 579.

While there are four principal defences to an action in private nuisance, in practice the most significant are those of statutory immunity and statutory authority.[20]

The defence of statutory immunity is available when legislation expressly defines certain activity as non-tortious, or bars a law suit in respect of particular activities. *The Nuisance Act* and *The Farm Practices Protection Act* are examples of statutes providing a defence of statutory immunity.

The defence of statutory authority operates to preclude a finding of liability if the defendant's activity is authorized by statute, and the defendant proves that the disturbance to others is the inevitable result of exercising the statutory authority. Courts have interpreted this defence narrowly, placing the onus on the defendant to prove that the activity was authorized by statute, that there were no alternative methods of carrying out the work, and that it was practically impossible to avoid the nuisance.[21]

Canadian law does not recognize a defence of coming to the nuisance whereby a defendant is absolved of liability if he was engaged in the activity complained of before the plaintiff moved into the area.[22] Courts will not necessarily give priority to first-in-time land use, although some such considerations may enter into a nuisance analysis under the category of "the character of the neighbourhood".

There are two remedies available for a successful action in private nuisance: an injunction and an award of damages. Although injunctions are typically awarded in cases of continuing nuisance, courts have begun to demonstrate flexibility in this regard, giving consideration to the hardship to the defendant or to the public in deciding whether to grant an injunction.[23] Damages are an appropriate remedy in cases "where the harm is small, where adequate damages are easily estimated, and where an injunction would create intolerable hardship for the defendant."[24]

2. Public Nuisance

Private nuisance and public nuisance are separate concepts, and are generally thought to have quite distinct origins.[25] Private nuisance has historically been a tool for resolving private disputes about conflicting land usage. Public nuisance has its origins in the criminal law and concerns interference with public rights, not necessarily connected with the use or enjoyment of land.

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[20] The others are prescription and consent, both described in Osborne, *supra* note 13 at 394-395.
[21] *Ryan v. Victoria (City)* [1999] 1 SCR 201 at para 55, (available on Can LII).
[22] *O'Regan v. Bresson* (1977), 23 NSR (2d) 587, 3 CCLT 214 (NS Co Ct); *Russell Transport Ltd. v. Ontario Malleable Iron Co.* [1952] OR 621 (Ont Sup Ct); *Sturges v. Bridgman* [1879] 11 Ch D852 at 865. This is in contrast with U.S. law which has historically given priority to land use that is first-in-time. This principle is embodied in much of the U.S. right-to-farm legislation.
[23] See discussion in Lewis Klar, *Tort Law*, 4th ed (Scarborough: Thomson Carswell, 2008) at 744.
[24] Osborne, *supra* note 13 at 396.
[25] For the prevailing view, see Klar, *supra* note 23 at 716.

In *Ryan v. Victoria (City)*, the Supreme Court of Canada summarized the principal features of public nuisance:

> A public nuisance has been defined as any activity which unreasonably interferes with the public's interest in questions of health, safety, morality, comfort of convenience. Essentially, the conduct complained of must amount to an attack on the rights of the public generally to live their lives unaffected by inconvenience, discomfort or other forms of interference. An individual may bring a private action in public nuisance by pleading and proving special damage. Such actions commonly involve allegations of unreasonable interference with a public right of way, such as a street or highway.[26] [citations omitted]

The state may initiate criminal proceedings in respect of public nuisance under the provisions of the *Criminal Code*.[27] The Attorney General may also seek an injunction or damages for public nuisance in a civil proceeding. Individuals may bring an action in public nuisance only if they can demonstrate that they have suffered special damage which is distinct from the inconvenience and loss suffered by members of the general public. Such special damage will ordinarily consist of personal injury, property damage or economic loss.[28]

3. Nuisance in the Modern Legal Context

There is now a multitude of municipal, provincial and federal instruments regulating subject matter which was traditionally within the purview of the common law of nuisance, such as noise, odour, and obstruction of public spaces.[29] This proliferation of legislation and regulation has caused some commentators to question the continued relevance of the common law of nuisance and to suggest that it has "come close to being merely a troubled footnote in the history of law."[30]

A better view is that both common law nuisance and statute law are necessary components in the effective regulation of such matters as environmental protection and the resolution of land-use conflicts. Indeed, in many cases the interpretation and application of legislation depends on an understanding of the common law. Statutes such as *The Nuisance Act* and *The Farm Practices Protection Act*, for example, use the term "nuisance" but do not define it. Thus, there are often important gaps in the statutory schemes governing nuisance-related activities that must be filled by common law principles.

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[26] *Ryan*, *supra* note 21 at para 52.

[27] RSC 1985, c C-46, s 180(2). This section defines a common nuisance as any act or omission that endangers the lives, safety health, property or comfort of the public; or obstructs the public in the exercise or enjoyment of any right that is common to all the subjects of Her Majesty in Canada.

[28] Cullingham, *supra* note 1 at 17-46.

[29] These include municipal by-laws, provincial environmental and public health legislation, standards and guidelines, and land use planning legislation.

[30] See Pun, *supra* note 9 at 2.

In addition, the common law actions may provide relief where statutory regimes do not, allowing parties to vindicate private rights. A private individual has no standing to enforce a municipal by-law,[31] and environmental and public health statutes typically offer very little scope for private action.[32] An action in nuisance may be the only way for an aggrieved individual to receive compensation, thereby fulfilling one of tort law's most significant policy objectives.[33]

The common law of nuisance continues to play an important role in environmental litigation and the law of expropriation.[34] Recent comments from the Supreme Court of Canada have suggested the possibility of an expanded role for the law of nuisance in environmental protection.[35] In the United States, state Attorneys General have brought actions in public nuisance against product manufacturers alleging interference with public health,[36] and against emitters of greenhouse gases, contending that global warming is a public nuisance.[37] Although these attempts have not been uniformly successful, and are subject to some academic criticism,[38] they demonstrate the lasting influence of the ancient tort of nuisance.

4. Derogating from Common Law by Statute

The importance of private property rights in the common law system is well documented. The law has long recognized an individual's right to acquire, possess, control, enjoy and transfer interests in real and personal property. In his *Commentaries*, Sir William Blackstone described the right of property as absolute, subject to control or diminution only by the laws of the land.[39]

In the chapters that follow, the Commission will make recommendations for reform of *The Nuisance Act* and *The Farm Practices Protection Act*. These statutes curtail a plaintiff's right to bring an action in nuisance in certain circumstances, and in so doing, restrict the plaintiff's right to enjoy his or her property without interference.

In the Canadian system, legislation is enacted and interpreted within the context of the common law, and important principles of interpretation have evolved to govern the interaction of

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[31] *Gosse v. Terrace (City)* 2008 BCCA 210, 45 MPLR (4th) 31.

[32] A person may lay an information in respect of a breach of environmental or public health legislation, pursuant to sections 504 and 507.1(2) of the *Criminal Code*, but the Attorney General may intervene in a private prosecution, conduct the prosecution or withdraw the charges. Even if a private prosecution proceeds, there is no compensation available to the complainant.

[33] See Linden, *supra* note 19 at 4: "First and foremost, tort law is a compensator. A successful action puts money into the pocket of the claimant. This payment is supposed to reimburse the claimant for the economic and psychic damages suffered at the hands of the defendant."

[34] See for example: *Smith v. Inco*, 2010 ONSC 3790, 76 CCLT (3d) 92, rev'd 2011 ONCA 628, 107 OR (3d) 321, application for leave to appeal to S.C.C. dismissed [2011] SCCA 539; *Antrim, supra* note 10.

[35] See for example *British Columbia v. Canadian Forest Products Ltd.*, 2004 SCC 38, [2004] 2 SCR 74; *St. Lawrence Cement Inc. v. Barrette, supra* note 6.

[36] See for example *Diamond v. General Motors Corp.* 97 Cal Rptr 639, 639 (Ct App 1971).

[37] See for example *Connecticut v. American Electric Power Company Inc.*, 582 F 3d, 69 ERC 1385 (2d Cir 2009), rev'd (2011)131 S Ct 2527, 180 L Ed 2d 435.

[38] Victor Schwartz and Phil Goldberg, "The Law of Public Nuisance: Maintaining Rational Boundaries on a Rational Tort" (2006) 45 Washburn Law Journal 541.

[39] (1765-9, Bk 1, Ch 1:134).

these sources of law. In particular, statutes which derogate from the common law and restrict common law rights have traditionally attracted special considerations.

One such consideration is the presumption against abolishing or interfering with individuals' rights. As a leading authority on statutory interpretation explains:

> It is presumed that the legislature does not intend to abolish, limit or otherwise interfere with the rights of subjects. Legislation designed to curtail the rights that may be enjoyed by citizens or residents is strictly construed.[40]

The same principles of interpretation apply in respect of legislation restricting a right of action,[41] and legislation which interferes with private property rights.[42]

These presumptions are rooted not only in the common law's concern with private property rights, but also in significant rule of law considerations. The stability and certainty of law is enhanced by avoiding interpretations which interfere with established legal rights and principles, and by requiring the legislature to be clear and specific about its intentions.[43]

These principles of interpretation have been attenuated in the modern legal context, as courts are more prepared to weigh the importance of individual common law rights against broader social values and legislative goals. Modern courts generally avoid a rigid distinction between strict and liberal interpretation in favour of a more contextual, purposive approach. Nevertheless, the principles remain an important feature of the legal landscape,[44] reflecting the common law's age-old concern with the sanctity of private property rights.

In the context of this report, these principles serve as a reminder of the importance the Canadian legal system attaches to common law private property rights. On a more practical level, they also highlight the importance of drafting statutes such as *The Nuisance Act* and *The Farm Practices Protection Act* as unambiguously as possible, to give full effect to the legislature's intentions.

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[40] Ruth Sullivan, *Sullivan on the Construction of Statutes* 5th ed (Markham: LexisNexis, 2008) at 477. Sullivan describes strict construction as follows: "Legislation that is strictly construed is applied with reluctance, as sparingly as possible. General terms are read down; conditions of application are fully and carefully enforced. Any doubts or ambiguities are resolved in favour of non-application.", at 467.

[41] *Berardinelli v. Ontario Housing Corp.*, [1978] 1 SCR 275 at 280; *Ukrainian (Fort William) Credit Union Ltd. v. Nesbitt, Burns Ltd.* (1997), 36 OR (3d) 311, 152 DLR (4th) 640 (Ont CA).

[42] Sullivan, *supra* note 40 at 479.

[43] *Ibid.*

[44] In *Pyke v Tri Gro Enterprises* (2001), 55 OR (3d) 257 (Ont CA), application for leave to appeal to SCC dismissed [2001] SCCA No 493, the Ontario Court of Appeal relied on these principles in the interpretation of Ontario's *Farm Practices Protection Act*, SO 1998, c1 "... it is a well-established principle of statutory interpretation that if legislation is inconclusive or ambiguous, the court may properly favour the protection of property rights..." at para 76.

With these considerations in mind, the following chapters will analyze and make recommendations for reform of *The Nuisance Act* and *The Farm Practices Protection Act*.

CHAPTER 3

THE NUISANCE ACT

The Nuisance Act[1] restricts a person's right to sue a business in nuisance for odour-related disturbances. It has been called Canada's first right-to-farm legislation,[2] and its legislative history confirms that it was originally intended to protect agricultural operators from nuisance suits in respect of odour. Enacted in 1976, it has since received very little judicial or academic consideration.

A. THE ACT

The Nuisance Act is brief and is reproduced in its entirety at Appendix A.

The Act originally applied to both agricultural and non-agricultural businesses. With the enactment of *The Farm Practices Protection Act ("FPPA")* in 1992, *The Nuisance Act* was amended to exclude agricultural operations from its application. A 2010 amendment updated references to *The Environment Act* in the legislation.[3]

B. LEGISLATIVE HISTORY AND PURPOSE

Before 1976, there were no legislative restrictions in Manitoba on a person's right to bring an action in nuisance in respect of odour caused by a defendant's use of land.

The Nuisance Act was enacted in response to the unreported 1975 decision of the Manitoba Court of Queen's Bench in *Lisoway v. Springfield Hog Ranch Ltd.*[4] In that case, the plaintiff sued in nuisance in respect of odours emanating from the defendant hog ranch. After reviewing the common law of nuisance, the court concluded that there had been an unreasonable interference with the plaintiff's use and enjoyment of his land, awarding damages of $10,000 and ordering an injunction.

The sponsor of the bill which became *The Nuisance Act* presented the legislation as a way to protect defendants such as those in *Lisoway* from nuisance lawsuits.[5]

Legislators at the time also commented on the need to introduce proper land-use planning legislation. Appropriate comprehensive planning legislation, they felt, would eventually render *The Nuisance Act* unnecessary.[6]

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[1] RSM 1987, c N120, CCSM c N120.
[2] Patrick McCormally "Right to Farm legislation in Canada" online: (2007) Environment Probe, <http://www.probeinternational.org/envirowaterarticles/righttofarmcanada.pdf.> .
[3] SM 2010, c 33, s 42.
[4] [1975] MJ No 188 (QL)(QB).
[5] Manitoba, Legislative Assembly, *Official Report of Debates and Proceedings (Hansard)*, 30th Leg, 3rd Sess, No 131 (May 31, 1976) at 4455 (Hon Howard Pawley).
[6] *Ibid.*

During the 1992 debates on *The Farm Practices Protection and Consequential Amendments Act*, that Bill's sponsor made the following remark in respect of *The Nuisance Act*:

> The existing *Nuisance Act* will be changed with a consequential amendment to exclude agricultural operations. However, it will be left in place to protect other businesses from nuisance suit due to odour.[7]

This is the only statement made in respect of amendments to *The Nuisance Act* during the 1992 debates. The record does not reveal which businesses were felt to require protection from nuisance suits due to odour, or the policy basis on which such protection was justified.

C. CASE-LAW

A review of Manitoba case-law suggests that there had in fact been very few nuisance actions brought in respect of odour prior to the enactment of *The Nuisance Act* in 1976.

The earliest reported Manitoba odour nuisance case is a 1925 decision of the King's Bench in which the Municipality of St. Vital was found liable for dumping manure on the banks of the Seine River.[8]

In 1952, the Manitoba Court of Appeal upheld a decision awarding damages in nuisance against a defendant in respect of a variety of disturbances, including odour, emanating from an animal hospital.[9]

In the 1960s, Manitoba courts ruled on a series of cases concerning nuisance caused by municipal works authorized by statute. In *B.C. Pea Growers v. City of Portage la Prairie*,[10] the defence of statutory authority applied to relieve the defendant of liability in nuisance caused by odour emanating from a lagoon.[11]

In the 1992 decision, *MacGregor v. Penner*,[12] the Court of Queen's Bench considered an odour-related complaint in nuisance arising from smells emanating from a hog farm. The court analyzed the common law principles of nuisance, emphasizing the need to consider the characteristics of the neighbourhood in which the nuisance occurred. It found that, while there had been an interference with the plaintiff's enjoyment of land, it was not unreasonable and therefore not actionable. Having so concluded, there was no need to consider the defence of statutory immunity afforded by *The Nuisance Act*.

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[7] Manitoba, Legislative Assembly, *Official Report of Debates and Proceedings (Hansard)*, 35th Leg, 3rd Sess, No 65 (May 13, 1992) at 3325-26 (Hon Glen Findlay).

[8] *Still v. Rural Municipality of St. Vital*, [1925] 2 WWR 78.

[9] *Macieviech et al. v. Anderson et al.* (1952), 4 DLR 507.

[10] [1963] MJ No 83, aff'd (1965), 50 WWR 415 (Man CA), aff'd [1966] SCR150; see also *Roberts v. City of Portage la Prairie* (1969), 6 DLR (3d) 96 (Man CA), aff'd [1971] SCR 481; and *Goertzen v. Winkler* [1970] MJ No 118 (QL)(QB).

[11] In *B.C. Pea Growers*, the defendant was found liable in nuisance for the flow of water and effluent from the lagoon on to the plantiff's land.

[12] [1993] 1 WWR 245, aff'd [1994] 2 WWR 251(Man CA).

The Act has itself been judicially considered only once since *MacGregor*, in a motion for summary judgment in *College of Registered Psychiatric Nurses of Manitoba v. Dalco.*[13]

D. THE CASE FOR REPEAL OF *THE NUISANCE ACT*

Two important points emerge from the jurisprudence in Manitoba. First, there were very few odour-related common law nuisance actions in Manitoba before the enactment of *The Nuisance Act*, and the Act itself is rarely mentioned in the jurisprudence.

Second, as illustrated in *MacGregor*, the common law of nuisance is not necessarily inimical to a defendant's interests. The balancing process inherent in a nuisance analysis considers the location and utility of the defendants' conduct. These factors will often favour defendants, particularly in agricultural settings.

Indeed, commentators have remarked that Canadian judges have on the whole been sympathetic to farmers' interests, and are "particularly cautious in respect of agricultural operations such as hog farming and other animal husbandry that carry an unavoidable odour...".[14]

It is clear that lawmakers in 1976 were more concerned with the potential for litigation than with the actual number of nuisance lawsuits brought against farmers and other businesses. The Act has been criticized as a somewhat reactionary response to an isolated case,[15] displaying little consideration for the existing state of the law or the competing interests at stake.

The Nuisance Act was enacted in a hurry,[16] and, perhaps for this reason, it contains a number of troubling features which argue in favour of its repeal.

First, the Act is unnecessarily broad in its application. The principal legislative purpose identified in the debates was the protection of farmers against actions in nuisance. Despite this focus on agricultural concerns, the Act originally offered immunity to all businesses, both urban and rural. It was amended in 1992 to exclude agricultural operations from its ambit, but continues to apply to businesses of all descriptions. It was much broader than necessary to achieve its original legislative purpose, which is now fulfilled in any event by a separate statute, *The Farm Practices Protection Act*.

The Act was retained in 1992 to protect non-agricultural businesses from nuisance law suits. However, neither the case-law nor the legislative debates indicate which businesses required protection or what policy justifications there were for such immunity. Law-makers in

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[13] 2010 MBQB 276 (available on Can LII). In this case, the defendant argued that *The Nuisance Act* gave him a defence against a claim in breach of contract, despite a tenancy agreement that was in apparent conflict with the Act. The Court found that it was a genuine issue for trial as to whether *The Nuisance Act* could displace an agreement between parties.

[14] Phillip Osborne, *The Law of Torts* 4th ed (Toronto: Irwin Law, 2011) at 333.

[15] Charles Framingham, "The Right to Farm: A Bandaid for a Heart Attack" in D Buckingham and K Norman eds, *Law Agriculture and the Farm Crisis* (Saskatoon: Purich Publishing, 1992).

[16] It was the subject of debate on May 31, 1976 and June 1, 1976 and proceeded through the committee stage without amendment.

1976 were not concerned with a proliferation of nuisance actions against non-agricultural businesses. At a minimum, this speaks to the need to re-examine the policy behind the Act and consider whether it addresses legitimate modern-day concerns.

Finally, the Act places significant restrictions on a person's common law right of action in nuisance without providing an alternative dispute resolution mechanism. Law-makers have recognized this shortcoming, citing it as a justification for the enactment of *The Farm Practices Protection Act* in 1992.[17]

The absence of an alternative dispute resolution mechanism is all the more significant in light of *The Nuisance Act*'s provisions respecting onus of proof. To bring a law suit in odour-related nuisance against a non-agricultural business in Manitoba, a plaintiff must prove a violation *The Environment Act*, *The Public Health Act* or a land use control law.[18] These statutes, however, offer very little scope for private investigation or action.[19] The factual elements required to prove a violation of these statutes are under the control of the defendant or of a government agency.

Without government cooperation, the plaintiff has little possibility of meeting the evidentiary burden imposed by *The Nuisance Act*, and is therefore effectively denied access to the courts. And since the Act creates no alternative mechanism for resolving these types of disputes, individual plaintiffs would often be unable to obtain relief in respect of potentially significant land-use disturbances.[20] In the Commission's view, this represents an unacceptably broad encroachment on traditional common law rights.

To summarize, *The Nuisance Act* is rarely invoked in practice, and significantly restricts common law rights without a discernible policy justification. For these reasons, the Commission concludes that *The Nuisance Act* no longer has any practical utility in Manitoba's legal system, cannot be defended on legal principles and should be repealed.

RECOMMENDATION 1

The Nuisance Act *should be repealed.*

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[17] Manitoba, Legislative Assembly, *Official Report of Debates and Proceedings (Hansard)*, 35th Leg, 3rd Sess, No 65 (May 13, 1992) at 3325 (Hon Glen Findlay). See also Manitoba Agriculture, Soils and Crops Branch, *Discussion Paper Towards a Farm Practices Bill* (1989).

[18] *Supra* note 1, s 3.

[19] Although an individual may lay a private information for breach of *The Environment Act* or *The Public Health Act* under sections 504 and 507.1(2) of the *Criminal Code*, the Attorney General may take over a private prosecution at any time, and may therefore withdraw the prosecution or stay charges.

[20] Individuals may complain to their local municipalities about odour, but are dependent on the municipality to prosecute violations of any applicable odour by-law. Manitoba Conservation has an Odour Nuisance Management Strategy in place for developments regulated under the *Environment Act* or the *Dangerous Goods Handling and Transportation Act* (2008) online: Government of Manitoba <http://www.gov.mb.ca/conservation/envprograms/airquality/pdf/odour_nuisance_revised_document_exec_summary_english.pdf>. This strategy requires the government to investigate if it receives at least five odour complaints from individuals living in separate households within a period of 90 days. Neither of these approaches would result in compensation for the individual complainant.

CHAPTER 4

THE FARM PRACTICES PROTECTION ACT

Manitoba's *Farm Practices Protection Act*[1] (the *"FPPA"*) immunizes agricultural operators who are engaged in normal farm practices from liability in nuisance. Nearly all other Canadian provinces and American states have enacted comparable statutes, often generically referred to as "right-to-farm" legislation.

The *FPPA* covers disturbances related not only to odour, but also to noise, dust, smoke or other disturbance arising from an agricultural operation. It also establishes the Farm Practices Protection Board,[2] an administrative tribunal with jurisdiction to determine what constitutes a normal farm practice under the Act.

A. THE LEGISLATIVE HISTORY OF THE *FPPA*

Beginning in the late 1980s, Manitoba's policy makers recognized the deficiencies of *The Nuisance Act* as a mechanism for resolving odour-related land-use conflicts.[3] Many other Canadian provinces first introduced right-to-farm legislation at this time, providing further impetus to enact a more modern and comprehensive regulatory scheme for Manitoba.

The Farm Practices Protection and Consequential Amendments Act[4] was enacted in 1992 and came into force in 1994.

The Act was amended in 1997 to give the Farm Practices Protection Board specific enforcement powers.[5] Before 1997, the Act provided that an order made by the board could be filed in the court and enforced as if it were a judgment of the court.[6] This section authorized a party to board proceedings to take enforcement measures in respect of board orders. The 1997 amendment removed the power of a party to enforce board orders, and gave this authority to the board exclusively.[7]

The *FPPA* was again amended in 2001, removing time limits for appointments to the board and authorizing the board to review its orders on application by one of the parties.[8] A 2005 amendment gives immunity to board members against liability in the performance of their

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[1] SM 1992, c 41, CCSM c F45. See Appendix B.
[2] *Ibid. at* s 3(1).
[3] Manitoba Agriculture, Soils and Crops Branch, *A Discussion Paper Towards a Farm Practices Bill* (1989).
[4] SM 1992, c 41.
[5] *The Farm Practices Protection Amendment Act*, SM 1997, c 30.
[6] *Supra* note 4, s 12(4).
[7] *Supra* note 5, 3(2).
[8] *The Farm Practices Protection Amendment Act*, SM 2001, c 12.

duties under the Act.[9] Aside from these mostly procedural amendments, the Act is unchanged from the time of its enactment.[10]

B. THE SCHEME OF THE *FPPA*

The principal scheme of the Act is expressed in Section 2(1) as follows:

> 2(1) A person who carries on an agricultural operation, and who, in respect of that operation,
> (a) Uses normal farm practices; and
> (b) Does not violate
> (i) A land use control law,
> (ii) *The Environment Act* or a regulation or order made under that Act, or
> (iii) *The Public Health Act* or a regulation or order made under that Act;
>
> is not liable in nuisance to any person for any odour, noise, dust, smoke or other disturbance resulting from an agricultural operation, and shall not be prevented by injunction or other order of a court from carrying on the agricultural operation because it causes or creates an odour, noise, dust, smoke or other disturbance.

This immunity survives despite changes in municipal land-use by-laws, the ownership of the land, or the uses of neighbouring land.[11] Immunity is not dependent on the agricultural operation being first-in-time. Changes in the type, scale or intensity of an operation are arguably irrelevant under the Act, so long as the operations continue to meet the statutory standards.[12]

The Act establishes the Farm Practices Protection Board and creates a mechanism whereby a person may complain about a disturbance resulting from an agricultural operation. The board's task is to determine whether the disturbance results from a normal farm practice.[13] A person aggrieved by an agricultural disturbance must first file a complaint with the board, and wait 90 days before bringing an action in nuisance.[14] The board's decision respecting an agricultural operation must be considered by the court in any subsequent nuisance action.[15]

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[9] *The Farm Practices Protection Amendment Act*, SM 2005, c 54.
[10] The *Farm Practices Protection Fee Regulation*, Man Reg 90/94 and the *Normal Farm Practices Regulation*, Man Reg 20/2004, made under the Act, have been amended from time to time.
[11] *Supra* note 1, s 2(2).
[12] Jonathan Kalkamoff, "'The Right to Farm': A Survey of Farm Practices Protection Legislation in Canada" (1999), 62 Sask L Rev. 225 at para 32.
[13] *Supra* note 1, s. 9(1). In making this determination, the Board must have regard to certain Farm Practices Guidelines published by Manitoba Agriculture, Food and Rural Initiatives: Man. Reg. 20/2004. These Guidelines are amended from time to time.
[14] *Supra* note 1, s 9(5).
[15] *Supra* note 1, s 12(3).

C. RECOMMENDATION FOR A REVIEW OF THE *FPPA*

The regulatory scheme established by the *FPPA* has many merits. As Professor Osborne has noted, the common law of nuisance "... is not an entirely satisfactory device with which to resolve these kinds of disputes"[16] due to its inherent uncertainty and traditionally inflexible remedies. Even some critics of right-to-farm legislation agree that, in principle, it serves a legitimate purpose:

> The concept underlying "right to farm" laws has some merit. The concept is based on the assumption that (1) some degree of nuisance from farming practices is unavoidable and, (2) where this is the case, the right to earn a living should prevail over the right to be free from nuisances which offend the senses or occasionally interfere with the use and enjoyment of property but pose no threat to human health or the environment.[17]

Perhaps the Act's most significant improvement over the common law is in the creation of the Farm Practices Protection Board which offers a low-cost and accessible alternative to litigation in the courts. The respondents to the Commission's *Consultation Paper on The Nuisance Act and The Farm Practices Protection Act* emphasized the Board's important conciliatory role.

Despite its merits, right-to-farm legislation is controversial. In this regard, it is important to recognize the many competing legal and social interests at stake in this legislation. Commentators have raised questions about the equity of right to farm legislation and its effect on environmental issues and private property rights.[18]

In its decision in *Pyke v. Tri Gro Enterprises*, the Ontario Court of Appeal commented on this aspect of right-to-farm legislation:

> This Act represents a significant limitation on the property rights of landowners affected by the nuisances it protects. By protecting farming operations from nuisance suits, affected property owners suffer a loss of amenities, and a corresponding loss of property value. Profit-making ventures, such as that of the appellants, are given the corresponding benefit of being able to carry on their nuisance creating activity without having to bear the full cost of their activities by compensating their affected neighbours. While the Act is motivated by a broader public purpose, it should not be overlooked that it has the effect of allowing farm operations,

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[16] Philip Osborne, "A Review of Tort Decisions in Manitoba 1990-1993" (1993), 22 Man L J 191 at para 84.
[17] John Swaigen, "The "Right-to-Farm Movement and Environmental Protection", (1988) 4 CELR (NS) 121 at 122.
[18] See for example, Elizabeth Brubaker, *Greener Pastures, Decentralizing the Regulation of Agricultural Pollution* (University of Toronto Centre for Public Management Monograph Series, 2009); Swaigen, *ibid.*

practically, to appropriate property value without compensation.[19]

With rapid changes in technology and the science of farming, other commentators suggest that renewed consideration should be given to excluding certain types of agricultural enterprises from the ambit of the Act.[20]

American literature in this area, in particular, emphasizes the need to routinely re-evaluate the equitable justification for right-to-farm legislation, and to ensure that it continues to attract public support.[21]

The Commission does not propose to attempt to answer these various concerns. This can only be done through a thorough inter-disciplinary review, which exceeds the scope of this report. Nevertheless, the Commission suggests that a legislative scheme which restricts long-standing common law rights should be reviewed regularly to ensure that it achieves a balance among the various interests involved, and is consistent with entrenched legal principles and values.

Several Canadian legislatures and American states have deemed it worthwhile to revise their right-to-farm statutes periodically[22] and, after 18 years of service, Manitoba's Act is due for modernization.

With these considerations in mind, the Commission recommends that the government conduct a review of the policies underlying the *FPPA* and the manner in which the Act operates in Manitoba. To ensure the fullest possible participation in this process, the Commission also recommends that the legislative review be done with public consultation.

RECOMMENDATION 2

The Department of Agriculture, Food and Rural Initiatives should conduct a public review of* The Farm Practices Protection Act *and its relationship with other environmental and land-use planning legislation and regulations in Manitoba.

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[19] *Pyke v. Tri Gro Enterprises Ltd.* (2001), 55 OR (3d) 257 at para 75 (Ont CA), application for leave to appeal to SCC dismissed [2001] SCCA No 493. Similar considerations led Iowa's highest court to find that state's right-to-farm legislation unconstitutional on the basis that it effects a taking of private property without compensation: *Gacke v. Pork Xtra L.L.C.*, 684 NW 2d 168, 173-174 (Iowa 2004); *Bormann v. Bd. of Supervisors*, 584 NW 2d 309, 321 (Iowa 1998), *cert denied*, 525 US 1172 (1999).

[20] Martin Phillipson and Marie-Ann Bowden, "Environmental Assessment and Agriculture: An Ounce of Prevention is Worth a Pound of Manure" (1999) 62 Sask L Rev 415; National Farmers Union "Submission to the Ontario Ministry of Agriculture, Food and Rural Affairs and the Ontario Ministry of Environment and Energy on Intensive Agricultural Operations in Rural Ontario" online (2000) <http: www.nfu.ca/intensive agric. htm>.

[21] See for example, Neil D. Hamilton, "Right-To Farm Laws Reconsidered: Ten Reasons Why Legislative Efforts to Resolve Agricultural Nuisances may be Ineffective" (1998) 3 Drake J Agric L 103 at 106; Alexander Reinert, "The Right-to-Farm: Hog Tied and Nuisance Bound (1998) 73 NYU L Rev 1694.

[22] In Canada, the provinces of British Columbia, Alberta, Ontario and Nova Scotia have enacted successive versions of their right-to-farm statutes.

The Commission's *Consultation Paper on The Nuisance Act and The Farm Practices Protection Act*[23] contains a number of additional provisional recommendations for reform of *The Farm Practices Protection Act*. The Commission has decided not to include these additional recommendations in this final report.

Two factors influenced the Commission's decision in this regard. First, the responses to these recommendations were generally not favourable. Specifically, both Keystone Agricultural Producers and Manitoba Pork Council disagreed with several of the Commission's provisional recommendations for reform of the *FPPA*. As a consultative body, the Commission must be responsive to the comments received through the public consultation process. In addition, the low response rate suggests to the Commission that there is not a significant perceived need for legislative change in this area.

The Commission was also influenced by the province's announcement in November 2012 that it will amalgamate the Farm Practices Protection Board with the Farm Mediation Board, the Farm Mediation Board Peer Advisory Committee, the Farm Machinery and Equipment Board and the Farm Lands Ownership Board.[24] It is to be expected that the province will review and reconcile the various constituting statutes for these boards and agencies as part of the amalgamation process. Several of the Commission's provisional recommendations are for changes to the Board's practice and procedure, which will now likely be revisited as part of a larger legislative review.

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[23] www.manitobalawreform.ca.

[24] Manitoba Department of Finance, News Release, "Province to Achieve Greater Efficiency with 20 Per Cent Fewer Agencies, Boards, Commissions: Struthers" (November 16, 2012) online: Government of Manitoba <http://news.gov.mb.ca/news/index.html?archive=2012-11-01&item=15564>; "Reductions on Schedule for Boards, Agencies', Winnipeg Free Press (November 17, 2012) online: Winnipeg Free Press <http://www.winnipegfreepress.com/local/reductions-on-schedule-for-boards-agencies-179777921.html>.

CHAPTER 5

CONCLUSION

In this report, the Commission makes recommendations for the repeal of *The Nuisance Act* and for a review of *The Farm Practices Protection Act.*

Both statutes significantly restrict the availability of remedies in the common law of nuisance, in agricultural and other settings. The common law of nuisance provides important remedies in the context of environmental law and in the vindication of private property rights. Access to justice and rule of law considerations suggest that a private citizen's right to a remedy in the law of nuisance should be restricted only to the extent necessary to achieve legitimate policy goals. The Commission offers its recommendations with these considerations in mind.

The Nuisance Act is rarely used in practice and its original legislative purpose has now been largely overtaken by *The Farm Practices Protection Act*. One of the Commission's functions is to identify obsolete statutes which add uncertainty to the law of Manitoba. The Commission suggests that *The Nuisance Act* is one such statute, and recommends its repeal.

The Farm Practices Protection Act immunizes agricultural operators from liability in nuisance in respect of certain agricultural disturbances caused by normal farm practices. The Commission identifies both the merits of the regulatory regime and some of its perceived shortcomings. The report concludes with a recommendation that the government conduct a broad, inter-disciplinary and public review of the Act and its relationship with other provincial environmental and land-use legislation and regulations.

The Commission recommends that these reforms be enacted with a view to modernizing the regulatory scheme governing land-use conflicts throughout Manitoba.

CHAPTER 6

LIST OF RECOMMENDATIONS

1. *The Nuisance Act* should be repealed. (p. 14)

2. The Department of Agriculture, Food and Rural Initiatives should conduct a public review of *The Farm Practices Protection Act* and its relationship with other environmental and land-use planning legislation and regulations in Manitoba. (p. 18)

This is a report pursuant to section 15 of *The Law Reform Commission Act*, C.C.S.M. c. L95, signed this 28th day of February, 2013.

"Original Signed by"
Cameron Harvey, President

"Original Signed by"
Jacqueline Collins, Commissioner

"Original Signed by"
Michelle Gallant, Commissioner

"Original Signed by"
John C. Irvine, Commissioner

"Original Signed by"
Gerald O. Jewers, Commissioner

"Original Signed by"
Myrna Phillips, Commissioner

"Original Signed by"
Perry W. Schulman, Commissioner

APPENDIX A

THE NUISANCE ACT

HER MAJESTY, by and with the advice and consent of the Legislative Assembly of Manitoba, enacts as follows:

Definitions

1 In this Act

"business" means any business, industry, undertaking, profession, process or operation, other than an agricultural operation under *The Farm Practices Protection Act*, carried on for gain or reward or the hope or expectation of gain or reward; (« entreprise »)

"land use control law" means any Act of the Legislature, regulation, planning scheme or by-law that restricts or prescribes the use to which land or premises may be put or the nature of businesses that may be carried on on any land or premises. (« loi régissant l'usage d'un bien-fonds »)

Relief from nuisance for odour

2 A person who carries on a business and who, in respect of that business, does not violate

(a) any land use control law;

(b) *The Public Health Act*;

(c) any regulation under *The Public Health Act* that deals specifically with the carrying on of that class or type of business;

(d) *The Environment Act*;

(e) an order or licence made or issued under *The Environment Act* in respect of the business; or

(f) any regulation under *The Environment Act* that deals specifically with the carrying on of that class or type of business;

is not liable in nuisance to any person for any odour resulting from the business and shall not be prevented by injunction or other order of a court from carrying on the business because it causes or creates an odour that constitutes a nuisance.

Onus of proof

3 Where a plaintiff or claimant in an action or proceeding against a person who carries on a business claims

(a) damages in nuisance for an odour resulting from the business; or

(b) an injunction or other order of a court preventing the carrying on of the business because it causes or creates an odour that constitutes a nuisance;

the onus of proving that the defendant violated any land use control law, or any Act, regulation, order or licence set out in section 2 lies on the plaintiff or claimant.

APPENDIX B

THE FARM PRACTICES PROTECTION ACT

(Assented to June 24, 1992)

HER MAJESTY, by and with the advice and consent of the Legislative Assembly of Manitoba, enacts as follows:

DEFINITIONS

Definitions

1 In this Act,

"agricultural operation" means an agricultural, aquacultural, horticultural or silvicultural operation that is carried on in the expectation of gain or reward, and includes

(a) the tillage of land,

(b) the production of agricultural crops, including hay and forages,

(c) the production of horticultural crops, including vegetables, fruit, mushrooms, sod, trees, shrubs and greenhouse crops,

(d) the raising of livestock, including poultry,

(e) the production of eggs, milk and honey,

(f) the raising of game animals, fur-bearing animals, game birds, bees and fish,

(g) the operation of agricultural machinery and equipment,

(h) the process necessary to prepare a farm product for distribution from the farm gate,

(i) the application of fertilizers, manure, soil amendments and pesticides, including ground and aerial application, and

(j) the storage, use or disposal of organic wastes for farm purposes; (« exploitation agricole »)

"board" means the Farm Practices Protection Board established under section 3; (« Commission »)

"court" means the Court of Queen's Bench; (« tribunal »)

"land use control law" means any Act of the Legislature, regulation, plan or by-law that restricts or prescribes the use to which land or premises may be put or the nature of business or activities that may be carried on on any land or premises; (« loi de réglementation en matière d'utilisation du sol »)

"minister" means the member of the Executive Council charged by the Lieutenant Governor in Council with the administration of this Act; (« ministre »)

"normal farm practice" means a practice that is conducted

(a) in a manner consistent with proper and accepted customs and standards as established and followed by similar agricultural operations under similar

circumstances, including the use of innovative technology used with advanced management practices, and

(b) in conformity with any standards set out in the regulations; (« pratique agricole normale »)

"person" includes an unincorporated association, partnership or cooperative. (« personne »)

PROTECTION FROM NUISANCE CLAIMS

Protection from nuisance claims

2(1) A person who carries on an agricultural operation, and who, in respect of that operation,

(a) uses normal farm practices; and

(b) does not violate

(i) a land use control law,

(ii) *The Environment Act* or a regulation or order made under that Act, or

(iii) *The Public Health Act* or a regulation or order made under that Act;

is not liable in nuisance to any person for any odour, noise, dust, smoke or other disturbance resulting from the agricultural operation, and shall not be prevented by injunction or other order of a court from carrying on the agricultural operation because it causes or creates an odour, noise, dust, smoke or other disturbance.

Protection continues despite change in by-law, etc.

2(2) Subsection (1) applies notwithstanding the occurrence of one or more of the following:

(a) the land use by-law of the municipality in which the agricultural operation is carried on changes or the agricultural operation becomes a non-conforming use;

(b) the ownership of the land on which the agricultural operation is carried on changes;

(c) the agricultural operation is carried on by other persons;

(d) the use of land near to the land on which the agricultural operation is carried on changes.

FARM PRACTICES PROTECTION BOARD

Farm Practices Protection Board established

3(1) The "Farm Practices Protection Board" is established and shall consist of not less than three members appointed by the Lieutenant Governor in Council.

Chairperson and vice-chairperson

3(2) The Lieutenant Governor in Council shall designate one of the members of the board as chairperson and another as vice-chairperson.

Duties of chairperson

3(3) The chairperson is responsible for the general supervision and direction of the conduct of the affairs of the board and, if he or she is absent or unable to act, the vice-chairperson shall have the powers of the chairperson.

3(4) Repealed, S.M. 2001, c. 12, s. 2.

Remuneration and expenses

3(5) The members of the board shall be paid such remuneration and receive such expenses as the Lieutenant Governor in Council determines.

Acting board members

4(1) The minister may from time to time nominate one or more persons from among whom acting members of the board may be selected.

Selection of acting board members

4(2) When in the opinion of the chairperson it is necessary or desirable for the proper performance of the board's duties, the chairperson may select not more than three persons nominated under subsection (1) as acting members of the board for a period of time or for the purpose of any matter before the board.

Powers and duties of acting member

4(3) An acting member has and may exercise and perform the powers and duties of a member of the board.

Remuneration and expenses

4(4) An acting member is entitled to be paid such remuneration and receive such expenses as the minister determines.

Quorum

5 Three members of the board, of whom at least two are members appointed under subsection 3(1), constitute a quorum and are sufficient for the exercise of all of the jurisdiction and powers of the board.

Management and procedural rules

6(1) The board may make rules for the management of its affairs and for the practice and procedure to be observed in matters before it. The rules may also authorize the chairperson or another officer or member to sign board documents.

Information and representations from parties

6(2) In any matter before it, the board shall give full opportunity to the parties to present information and make representations.

Part V of Evidence Act powers

7 The members of the board have the powers of commissioners under Part V of *The Manitoba Evidence Act*.

Board to conduct studies

8(1) The minister may direct the board to study any matter related to farm practices and the board shall conduct the study and report its findings and recommendations to the minister.

Professional assistance

8(2) The board may appoint one or more persons having technical or special knowledge of any matter to assist the board in any capacity in respect of a matter before it.

Protection from liability

8.1 No action or proceeding may be brought against the board, a member or acting member of the board or any other person acting under the authority of this Act for anything done or not done, or for any neglect,

(a) in the performance or intended performance of a duty under this Act or the regulations; or

(b) in the exercise or intended exercise of a power under this Act or the regulations;

unless the board or the person was acting in bad faith.

COMPLAINTS

Application for determination

9(1) A person who is aggrieved by any odour, noise, dust, smoke or other disturbance resulting from an agricultural operation may apply in writing to the board for a determination as to whether the disturbance results from a normal farm practice.

Contents of application

9(2) An application under subsection (1) shall contain a statement of the nature of the complaint, the name and address of the person making the application and the name and address of the agricultural operation, and shall be in a form acceptable to the board.

Notices

9(3) The board may require that an applicant give written notice, in such form and manner that the board specifies, to the persons that the board specifies.

Parties

9(4) The parties to an application are the applicant, the owner or operator of the agricultural operation and any person added as a party by the board.

No action commenced unless application made

9(5) A person shall not commence an action in nuisance for any odour, noise, dust, smoke or other disturbance resulting from an agricultural operation unless the person has, at least 90 days previously, applied to the board under this section for a determination as to whether the disturbance complained of results from a normal farm practice.

Subsequent nuisance action not required

9(6) A person may apply to the board for a determination under this section whether or not an action in nuisance is subsequently commenced.

Investigation and resolution of dispute

10 On receiving an application, the board may inquire into and endeavour to resolve a dispute between the aggrieved person and the owner or operator of the agricultural operation and may determine what constitutes a normal farm practice in respect of that agricultural operation.

Refusal to consider application

11(1) The board may refuse to consider an application or to make a decision if in its opinion,

(a) the subject-matter of the application is trivial;

(b) the application is frivolous or vexatious or is not made in good faith; or

(c) the applicant does not have a sufficient personal interest in the subject-matter of the application.

Decision given to parties

11(2) The board shall notify the parties of its refusal to consider an application or to make a decision under subsection (1), and give them written reasons for its action.

Decision of the board

12(1) If the board is unable to resolve the dispute between the aggrieved person and the owner or operator of the agricultural operation, the board shall

(a) dismiss the complaint if the board is of the opinion that the disturbance complained of results from a normal farm practice; or

(b) order the owner or operator of the agricultural operation to cease the practice causing the odour, noise, dust, smoke or other disturbance if it is not a normal farm practice or to modify the practice in the manner set out in the order to be consistent with normal farm practices.

Decision given to parties

12(2) The board shall give a copy of its decision to each of the parties together with written reasons for the decision.

Decision shall be considered by court

12(3) A decision of the board under this section respecting an agricultural operation shall be considered by the court in any subsequent action in nuisance taken in respect of that operation.

Order of board may be filed in court

12(4) Where a person has failed to comply with an order of the board made under subsection (1) and the time for an appeal against the order has expired, the board may file a copy of the order, certified by the chairperson or secretary of the board to be a true copy, in court.

Board may apply to court

12(5) Upon filing under subsection 12(4), the order shall be deemed to be a judgment of the court in favour of the board and the board may apply to a judge of the court for an order requiring the person to comply with the judgment and the judge may also make one or more of the following orders:

(a) a contempt order against the person;

(b) an order respecting costs;

(c) any other order that may be necessary to give effect to the judgment or that the judge considers just.

Appeal

13 Any party to an application may appeal an order of the board on a question of law to the court within 30 days after the making of the order.

Board may review orders

13.1(1) Subject to subsection (5), the board may review an order it has made, if a party or another person who is affected by the order applies.

Disposition by the board

13.1(2) After the review, the board may, by further order, dismiss the application or change, revoke or replace the order.

Membership of board on review

13.1(3) The members of the board who review the order may be different from the members who made it.

Application of certain previous provisions

13.1(4) Subsections 9(2) to (4) and sections 10 to 13 apply, with necessary changes, to an application or order made under this section.

Limitations on review power

13.1(5) The board shall not review an order

(a) before the end of the appeal period set out in section 13;

(b) after an appeal has been made under section 13 but before it is determined or withdrawn; or

(c) after the order has been filed in court under subsection 12(4).

Injunction proceedings in abeyance

14(1) When an agricultural operation is the subject of an application under subsection 9(1), no injunction proceedings may be commenced or continued in respect of that agricultural operation until the board has made a decision under subsection 12(1) or has refused to hear the application.

Exception

14(2) Subsection (1) does not apply to proceedings taken under *The Environment Act* or *The Public Health Act*.

GENERAL PROVISIONS

Regulations

15 The Lieutenant Governor in Council may make regulations

(a) prescribing fees payable in respect of applications made under subsection 9(1) or 13.1(1);

(b) respecting the nomination and selection of acting members of the board;

(c) respecting standards for the purpose of the definition of "normal farm practice";

(c.1) respecting matters that the board must have regard to in determining what constitutes a normal farm practice for agricultural operations;

(d) respecting any other matter or thing necessary or advisable for carrying out the purposes of this Act.

16

NOTE: This section contained consequential amendments to *The Nuisance Act* which are now included in that Act.

C.C.S.M. reference

17 This Act may be cited as *The Farm Practices Protection Act* and referred to as chapter F45 of the *Continuing Consolidation of the Statutes of Manitoba*.

Coming into force

18 This Act comes into force on a day fixed by proclamation.

NOTE: S.M. 1992, c. 41 was proclaimed in force January 31, 1994.

THE NUISANCE ACT AND *THE FARM PRACTICES PROTECTION ACT*

EXECUTIVE SUMMARY

For centuries, the common law of nuisance has served to resolve conflicts between neighbours over incompatible land use. *The Nuisance Act* and *The Farm Practices Protection Act*, enacted in 1976 and 1992 respectively, restrict the role of the common law of nuisance in resolving such disputes. This legislation has important implications for the environment and the exercise of individual property rights, and in that respect merits careful consideration.

In this report, the Manitoba Law Reform Commission reviews the common law of nuisance and its historical role in regulating environmental and land-use conflicts. The Commission describes the history and role of *The Nuisance Act*, determining that the Act is rarely used in practice and is over-broad in its application. The Commission concludes by recommending the repeal of *The Nuisance Act*. The Commission also identifies both the merits and some of the perceived shortcomings of *The Farm Practices Protection Act*, and recommends a broad, inter-disciplinary and public review of the Act.

LOI SUR LES NUISANCES ET *LOI SUR LA PROTECTION DES PRATIQUES AGRICOLES*

RÉSUMÉ

Depuis des siècles, la common law sur les nuisances a servi à régler des conflits entre voisins relativement à l'incompatibilité d'utilisation des terrains. La *Loi sur les nuisances* et la *Loi sur la protection des pratiques agricoles*, promulguées en 1976 et 1992 respectivement, limitent le rôle de la common law sur les nuisances dans le règlement de telles disputes. Ces lois ont d'importantes implications pour l'environnement et l'exercice des droits de propriété individuels, et pour cette raison méritent une attention tout particulière.

Dans le présent rapport, la Commission de réforme du droit du Manitoba examine la common law sur les nuisances et son rôle historique dans le règlement de différends relatifs à l'environnement et à l'utilisation du territoire. La Commission décrit l'histoire et le rôle de la *Loi sur les nuisances*, et observe qu'elle est rarement utilisée dans la pratique et que sa portée est trop étendue. En conclusion, la Commission recommande l'abrogation de la *Loi sur les nuisances*. La Commission a également relevé les mérites et certaines lacunes perçues de la *Loi sur la protection des pratiques agricoles*, et recommande un examen approfondi, interdisciplinaire et public de celle-ci.